

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :	CRIMINAL ACTION
v. :	NO. 90-00431-01
RICHARD RAMOS :	CIVIL ACTION
	NO. 05-6244

ORDER & MEMORANDUM

ORDER

AND NOW, this 24th day of January, 2006, upon consideration of the *pro se* Habeas Corpus Motion Under 28 U.S.C. § 2255 filed by Richard Ramos (Document No. 86, filed December 21, 2005), in which Motion *pro se* petitioner argues that the sentence imposed on February 25, 1994, is unconstitutional in light of the Supreme Court decision in *United States v. Booker*, 125 S. Ct. 738 (2005), **IT IS ORDERED** that, for the reasons set forth in the following Memorandum, the *pro se* Habeas Corpus Motion Under 28 U.S.C. § 2255 filed by Richard Ramos is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2).

MEMORANDUM

I. BACKGROUND

Defendant was charged in a Superseding Indictment returned May 28, 1991, with numerous drug related crimes. On July 13, 1992, defendant pled guilty to Count Two of the Superseding Indictment which charged continuing criminal enterprise in violation of 21 U.S.C. § 848.

Defendant was sentenced on February 25, 1994. At that time, the Court determined that defendant's total offense level was 52 under the United States Sentencing Guidelines

(“Guidelines”). In Criminal History Category II, with a total offense level of 52, the Guideline Imprisonment Range was life imprisonment. However, the Government filed a downward departure motion under § 5K1.1 of the Guidelines and 18 U.S.C. § 3553(e). Further, the parties entered into a binding plea agreement under Federal Rule of Criminal Procedure 11(e)(1)(C), accepted by the Court, providing that the final sentence upon departure would be thirty (30) years imprisonment.

On February 25, 1994, the Court imposed, *inter alia*, a sentence of thirty (30) years imprisonment on Count Two of the Superseding Indictment. At sentencing, the Court stated that it struggled in determining whether a thirty (30) year sentence was sufficiently harsh under all of the circumstances of the case but decided nevertheless to accept the agreement of the parties.

II. DISCUSSION

Defendant seeks relief by Habeas Corpus Motion Under 28 U.S.C. § 2255 on the basis of *United States v. Booker*, 125 S. Ct. 738 (2005). The relief sought is denied on the ground that *Booker* does not apply retroactively to cases on collateral review. *Lloyd v. United States*, 407 F.3d 608 (3d Cir. 2005). Specifically, the Third Circuit held as follows in *Lloyd*: “Because *Booker* announced a rule that is ‘new’ and ‘procedural,’ but not ‘watershed,’ *Booker* does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date *Booker* issued.” *Id.* at 615-16.

Petitioner’s reliance on *Dodd v. United States*, 125 S. Ct. 2478 (2005) is misplaced. First, *Dodd* involved a right that the Supreme Court held was retroactive. Second, the Supreme Court in *Dodd* announced a rule pertaining to the limitations period in 28 U.S.C. § 2255, ¶ 6(3). The Supreme Court concluded that under 28 U.S.C. § 2255, ¶ 6(3), the limitations period begins to run on the date the new rule is announced rather than the date on which the new rule is held to apply retroactively. That decision has no bearing on the Court’s conclusion in the instant case because the right in question, the applicability of *Booker* to cases on collateral review, has been ruled not to apply retroactively by the Third Circuit.

Petitioner's reliance on *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510 (1994) is also misplaced. *Rivers* dealt with judicial construction of a statute. The Supreme Court in *Rivers* held that such construction was an authoritative statement of what the statute meant before as well as after the decision in the case giving rise to that construction. That is not the issue before this Court. The issue decided by the Supreme Court in *Booker* did not involve construction of a statute, but rather the constitutionality of the Guidelines. On that issue, the Third Circuit has spoken - the *Booker* decision is not applicable retroactively to cases on collateral review.

The Court also notes that it did not impose a sentence within the Guideline Imprisonment Range in this case. To the contrary, the Court granted the Government's motion to depart downward under § 5K1.1 of the Guidelines and 18 U.S.C. § 3553(e), and accepted the binding plea agreement executed by the parties under Federal Rule of Criminal Procedure 11(e)(1)(C). That agreement provided for a final sentence upon departure of thirty (30) years imprisonment, and that is the sentence that was imposed on defendant.

The Court also concludes that petitioner has failed to make a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2). Therefore, a certificate of appealability will not issue.

III. CONCLUSION

Pro se petitioner's Habeas Corpus Motion Under 28 U.S.C. § 2255 is denied for all of the foregoing reasons.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.